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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. [redacted] 5

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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PAGE

INDEX.

PAGE

Opinion below 1

Statutes involved 1

Question presented 2

Statement 2-9

Summary of argument 10-16

Argument 17-66

I. Miller Law pensions involve no agreement of parties and the grant of them creates no vested right. They may be reduced or changed at any time in the discretion of the Legislature 17-46

II. The Miller Law amounts to no more than a declaration of legislative policy on pensions and the acceptance of its benefits does not create a contract 46-60

III. The Miller Law is a local public law, purely governmental, and has to do with State governmental objects and not with any private enterprise thereof 60-63

IV. Where a statute is claimed to create a contractual right, this court will give weight to the construction of a statute by the courts of the state. Unless such construction is palpably erroneous, this court will accept the construction placed upon such statutes by the state courts 63-66

TABLE OF CASES CITED.

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785 ..... 15, 60
Armstrong v. City of Chicago, 247 Ill. App. 584 .... 4, 47, 49
Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 48 ..... 15, 60
Bates v. Board of Education, 139 Cal. 145 48
Beutel v. Foreman, 288 Ill. 106 ..... 11, 24, 31, 35
Board of Education of the City of Chicago v. Upham, 357 Ill. 263 2
Bowler v. Nagel, 228 Mich. 434, 200 N. W. 258 .. 13, 44, 45
Casserly v. City of Oakland, 6 Cal. (2nd) 64 .. 12, 13, 41, 45
Cobbs v. Home Ins. Co., 18 Ala. App. 206, 91 So. 627 . 14, 45
Combes v. Getz, 285 U. S. 434, 76 L. ed. 866 ..... 16, 66
Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169 ..... 16, 63
DeWolf v. Bowley, 355 Ill. 530 ..... 11, 13, 31, 32
Dismuke v. United States, 297 U. S. 167, 80 L. ed. 375 ..... 10, 13, 21, 45
Dodge v. Board of Education, 364 Ill. 547 . 11, 19, 20, 23, 24, 63
Dryden v. Board of Pension Commissioners of the City of Los Angeles, et al., 59 Pac. (2nd) 104 40
Eddy v. Morgan, 216 Ill. 437 ..... 11, 24
Fellows, Attorney General v. Connolly, 193 Mich. 499, 160 N. W. 581 ..... 13, 42, 45
Freeport W. Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679 ..... 10, 16, 66
Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657 .. 10, 20
Gibbs v. Relief Ass'n, 125 Minn. 174, 145 N. W. 1075 .. 12
Greene v. Lessee of Neal, 6 Pet. 291, 8 L. ed. 402 ..... 15, 61
Head v. Jacobs, 150 Ky. 290, 150 S. W. 349 ..... 12, 38
Hein v. McCall, 239 U. S. 175, 60 L. ed. 206 ..... 15, 60
Holton v. Tampa, 119 Fla. 556, 159 S. W. 292 12
Hughes v. Traeger, 264 Ill. 612 ..... 11, 14, 31
Jackson ex dem. Hart v. Lamphire, 3 Pet. 280, 7 L. ed. 679 ..... 16, 63
Jones et al. Trustees v. Prairie O. & G. Co., 6 Pet. 291 .. 62
Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 Pa. 36 ..... 14, 43, 45
Keine v. Community H. S. Dist., 348 Ill. 228 48

Lage v. City of Marshalltown, 212 Iowa 53, 235 N. W. 761 ..... 14, 45
Lynch v. United States, 292 U. S. 571, 78 L. ed. 1434.. 10, 20
Matter of Mahon v. Board of Education, 68 N. Y. App. Div. 154 ..... 13, 44, 45
McCann v. Retirement Board, 331 Ill. 193..... 11, 24, 29
Mead, et al v. Acton, et al., 139 Mass. 341..... 13, 44, 45
Mell v. State, 130 Ohio St. 306..... 12, 36
Milwaukee El. Ry. Co. v. R. R. Com., 238 U. S. 174, 59 L. ed. 1254 ..... 16, 66
Morehead v. N. Y. ex rel. Tixaldo, 80 L. ed. 921.. 15, 61
New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352..... 53
Passaic National Bank & Trust Co. v. Eelman, 116 N. J. Law 279, 183 A. 677..... 12, 39
Pecoy v. Chicago, 265 Ill. 78..... 11, 24
Pennie v. Reis, 132 U. S. 464, 33 L. ed. 426..... 19
People v. Abbott, 274 Ill. 380..... 11, 31
People v. Hanson, 330 Ill. 79..... 11, 24, 27
People v. Retirement Board, 326 Ill. 579..... 11, 24, 30
Phelps v. Board of Education, 81 L. ed. 388..... ..... 14, 16, 21, 22, 50, 64, 66
Porter v. Loehr, 332 Ill. 353..... 11, 31
Raines v. Board of Trustees Pension Fund, 365 Ill. 610 ..... 11, 32, 33
Renz v. Hibbing Firemen's Relief Ass'n, 186 Minn. 370, 243 N. W. 713 ..... 13, 14, 43, 45
Retirement Board v. McGovern, 316 Pa. 161, 134 Atl. 400 ..... 13, 42, 45
Roddy v. Valentine, 268 N. Y. 228, 197 N. E. 260.. 13, 44, 45
Rudolph v. United States ex rel. Stuart, 36 App. Cases D. C. 379 ..... 12, 38
Ryan v. Foreman, 262 Ill. 175..... 11, 24
Salt Mfg. Co. v. East Saginaw, 80 U. S. 373, 20 L. ed. 611 ..... 14, 54
Seton Hall College v. South Orange, 242 U. S. 100, 61 L. ed. 170 ..... 16, 66
Stanislaus County v. San Joaquin & K.'s R. C. & I. Co., 192 U. S. 201, 48 L. ed. 406..... 15, 58
State v. Love, 89 Neb. 149, 131 N. W. 196..... 13, 45
State ex rel. Gorczyca v. City of Minneapolis, 174 Minn. 594, 219 N. W. 924..... 13, 45

State ex rel. Stafford v. State Capitol A. & I. Board, 219 Wis. 31 ..... 13, 42
State ex rel. v. Zupnik, 131 Ohio St. 94 ..... 12, 38
Stiles v. Board of Trustees, 281 Ill. 636 ..... 11, 24
Tampa W. Works v. City of Tampa, 199 U. S. 241, 50 L. ed. 170 66
Trammell v. City of Dallas, not yet reported 12
Trotzier v. McElroy, 182 Ga. 719, 186 S. E. 817 ... 13, 44, 45
Turner v. Board of Commissioners, 173 U. S. 461, 43 L. ed. 768 ..... 16, 63
United States v. Hall, 98 U. S. 343, 25 L. ed. 180 10
United States v. Hartwell, 6 Wall 385 ..... 14, 50
United States v. Teller, 107 U. S. 64, 27 L. ed. 352 ... 10, 19
Walton v. Cotton, 60 U. S. 555, 15 L. ed. 658 ..... 10, 18
Wisconsin & Michigan Railway Co. v. Powers, 191 U. S. 378, 48 L. ed. 229 ..... 15, 56

Table of Statutes Cited.

Miller Law as in force prior to July, 1935.

Smith-Hurd Ill. R. S. 1933, Chap. 122, Pars. 614a, 614b, 614c, p. 2725 ..... 3, 5, 6, 10, 17
Cahill's Ill. R. S. 1933, Chap. 122, Pars. 269 (1) 269(2) 269 (3), p. 2543.
Appendix, p. 68.

Miller Act of 1935, effective July 12, 1935.

Smith-Hurd Ill. R. S. 1935, Chap. 122, Pars. 614a, 614b, 614c, p. 3038 ..... 5, 6, 9, 10, 17
Ill. State Bar Stats. 1935, Chap. 122, Pars. 269 (1), 269 (2), 269 (3).
Appendix, p. 72.

Sections of the school law providing for the creation and maintenance of the public school teachers' pension and retirement fund in force prior to 1935.

Smith-Hurd Ill. R. S. 1933, Chap. 122, Pars. 175-190, pp. 2646-2650 ..... 2, 3
Cahill's Ill. R. S. 1933, Chap. 122, Pars. 176-191, pp. 2528-2533.

Sections of the school law providing for the creation and maintenance of the public school teachers' pension and retirement fund in force July 12, 1935.

Smith-Hurd Ill. R. S. 1935, Chap. 122, Pars. 175-190, pp. 2949-2954 3
Ill. State Bar Stats. 1935, Chap. 122, Pars. 176-191, pp. 2878-2883.

Sections of the school law authorizing a tax levy for public school teachers' pension and retirement fund as in force prior to July, 1935.

Smith-Hurd Ill. R. S. 1933, Chap. 122, Par. 212d, p. 2657.
Cahill's Ill. R. S. 1933, Chap. 122, Par. 313 (4), p. 2553.

Sections of the school law authorizing a tax levy for public school teachers' pension and retirement fund as in force July 12, 1935.

Smith-Hurd Ill. R. S. 1935, Chap. 122, Par. 212d, page 2965 3
Ill. State Bar Stats. 1935, Chap. 122, Par. 313 (4), p. 2907.

Tax levy for educational purposes.

Smith-Hurd Ill. R. S. 1935, Chap. 122, Par. 212a, Sec. 189 1/8, p. 2963 6
Ill. State Bar Stats. 1935, Chap. 122, Par. 313 (1), Sec. 189 1/8, p. 2905.

APPENDIX.

Miller Law in force prior to July, 1935 68-71
Miller Law of 1935 ..... 71, 72

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PAGE

IN THE

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No. 713

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEES.

Opinion Below.

The opinion of the Illinois Supreme Court is officially reported in *Dodge* v. *Board of Education,* 364 Ill. 547 (R. 265).

Statutes Involved.

The statutes involved are set forth in the appendix, *infra,* pages 68-72.

Miller Law as in force prior to the Act of July, 1935, Appendix, p. 68.

Miller Law of 1935, Appendix, p. 72.

Question Presented.

The sole question in this case, other than that of jurisdiction, heretofore raised, is, did the act of the legislature of the State of Illinois, commonly called the Miller Law of 1926 as amended in 1927 grant to Chicago teachers vested property rights in future installments of the pensions created by that law, which could not be reduced by a subsequent act of the legislature without impairing the obligation of a contract.

STATEMENT.

A consideration of the history of the pension laws of Illinois pertaining to Chicago school teachers we believe will assist in understanding the questions involved.

Chicago's retired school teachers continuously since 1926 have been the recipients of two pensions, each separate and distinct from the other—one, under the regular Teachers' Pension and Retirement Fund Act—the other under the so-called Miller Law. No other school system or public body so far as we have been able to discover has either such a system of double pensions or makes provision for retired teachers as the Chicago Board of Education is required to do under the law (Miller Law) now before this court.

The General Assembly of Illinois first made provision for pensions in 1895 for public school teachers of the Chicago public school system, who voluntarily retired. The fund was originally maintained solely by contributions from teachers. That law has been amended many times. It is

now a part of the school act and appears in Par. 175 (Sec. 152) to Par. 190 (Sec. 165) of Chap. 122, Smith-Hurd Ill. R. S. 1935. It is commonly known as the Public School Teachers' Pension and Retirement Fund Act, deriving its name from the fact that the fund created by the statute is called in the statute "the public school teachers' pension and retirement fund." The fund is now supported by a tax levied for that purpose under the authority of Par. 212d (Sec. 189½), Chap. 122, Smith-Hurd Ill. R. S. 1935, and from deductions from teachers' salaries made pursuant to Sec. 155 (Par. 178, Chap. 122, *id.*) of the school law. The teachers' pension fund is administered by a board of trustees and all pensions payable under the act are payable solely out of this fund.

The statute pertaining to this pension was amended in 1935 to increase the tax rate authorized to be levied pursuant to Par. 212d, Chap. 122, *id.*, and at the same time increased the amount of the pensions to be received under it by the teachers upon retirement to amounts ranging from $800.00 to $1,200.00 per annum, depending upon length of service. The retired teachers are continuing to receive their pensions under this act, the validity of which is not challenged by appellants.

The General Assembly of Illinois in 1925 passed a second pension law for teachers, commonly known as the Miller Law. This act was not presented to the Governor of Illinois for approval until May 19, 1926 and therefore did not become a law until that date. It is set forth on page 49 of the transcript of record filed herein. This act provided for compulsory retirement of teachers aged 75 or over in 1926, aged 74 in 1927, aged 73 in 1928, aged 72 in 1929, and aged 70 or over in 1930, and provided for annual payments of $1,500.00 to each teacher so retired. This

payment was in addition to the amount received by such retired teachers from the regular Teachers' Pension Fund above referred to, as the Miller Law expressly provided that nothing in the act contained should in any way impair or prejudice any right of a teacher to the pension under the Teachers' Pension and Retirement Fund Act, previously described (R. 50).

The Miller Law contained a provision that any teacher or principal retired pursuant to the act should be subject to the call of the superintendent of schools for consultation or advisory service (R. 50).

During the period that elapsed between the passage of this act and its final approval by the Governor, the appellee board by a rule attempted to provide for the retirement of teachers and the payment of pensions in practically the same manner as provided by the statute. The rule was not intended, nor was it so worded as to be in conflict with the Teachers' Pension and Retirement Fund, but provided for a pension of $1,500.00 per annum, in addition to the regular teachers' pension. This rule, like the statute, contained a provision that the teachers retired pursuant to it should be subject to the call of the superintendent of schools for consultation or advisory service. The validity of the rule was challenged by the teachers in the case of *Armstrong* v. *City of Chicago,* 247 Ill. App. 584. The Board of Education, the defendant herein and appellee therein, in attempting to justify the rule, offered evidence of consultation and advisory service as provided by the rule. In passing on this point, the Appellate Court on page 597 said:

> "The evidence introduced on the hearing discloses that the services or duties, which the complainants (under the emeritus rules and after their transfer to such service) were expected to perform and actually were

called upon to perform, were unsubstantial; and also tends to show that the real intent of the Board, in passing and acting upon said rules, was to retire complainants, and other principals and teachers who had reached 70 years of age, virtually upon a pension, and that the consultation and advisory service, as mentioned in the rules, was in the nature of a pretense or disguise, giving color to the claim that complainants still were in the education service, whereas in fact they really had been retired or removed therefrom."

The Appellate Court reversed the lower court and specifically ordered that they be reinstated, but when so reinstated their tenure in their positions be subject to the provisions of the Miller Law, saying (p. 599):

> "* * * but that their tenure in said positions be subject to the provisions of said 'Miller Act,' as originally in force on May 19, 1926, and as amended on June 24, 1927."

In 1927 the Miller Law was amended by adding Section 3, which provided for pensions on a sliding scale ranging from $1,000.00 to $1,500.00 per year to teachers voluntarily retiring between the ages of 65 and 70 (R. 62-63).

This section was repealed by the Act of 1935.

The Miller Law as originally adopted or as subsequently amended neither established nor made provision for the establishment of a fund out of which such pensions are payable. There is no provision for teachers' contributions. The law does not authorize or provide for deductions from teachers' salaries of any money to be used towards the payment of such pensions and teachers contribute nothing towards these pensions. These pensions are, by the act, expressly made payable solely from moneys derived from the general tax levy for educational purposes—the tax provided by law for the payment of salaries of teachers and

others actively engaged in operating the schools of Chicago. The educational taxes are levied annually pursuant to Section 189½ of the School Law, par. 212-A, Smith-Hurd Ill. R. S. 1935.

These pension provisions of the Miller Law are all found in Sections 2 and 3 of the act. Section 1 of the act pertains solely to retirement. The Miller Law having become effective May 19, 1926 (R. 49), the Superintendent of Schools, pursuant to its provisions, on July 28, 1926, reported the names of a total of twenty persons who on August 1, 1926, would be required to be retired pursuant to the act and be paid the sum of $1,500.00 annually (R. 12-13). This required an expenditure of $12,000.00 during the year 1926 by the Board of Education out of educational taxes.

On January 12, 1927, fourteen additional persons were retired (R. 74). These retirements increased annually and the amounts required to be paid to teachers retired pursuant to this Miller Law had increased to such an extent that the Board was required to and did appropriate for this expense in its annual school budget for the year 1935 the sum of $1,125,000.00 (R. 115, 132).

In the meantime these retired teachers were also receiving their regular pensions from the Public School Teachers' Pension and Retirement Fund pursuant to the other pension statute.

The financial depression that we have been passing through seriously affected the Chicago Board of Education. It owed millions of dollars to teachers for past due salaries and was without funds. With the exception of a few thousand dollars from miscellaneous revenues, the schools are maintained entirely from taxes.

This state of the Board's finances was found to exist by the Supreme Court in *Board of Education* v. *Upham*, 357 Ill. 263, a case involving a bond issue of the Board of Education, the proceeds of which were to be used for the payment of unpaid and past due teachers' salaries. The bonds were secured by a mortgage on the Board's real estate pursuant to a statute whose validity was challenged. The court in its opinion made the following finding of facts as to the financial condition of the appellee Board in 1934, on page 265:

> "The following facts are necessary to an understanding of the questions involved: The revenues of the board of education have been greatly diminished since 1928 on account of the non-payment and delay in the collection of taxes as well as the lowering of assessments of property values. As a result, the board has been unable to pay in full the salaries of its school teachers and other necessary expenses. Unpaid salaries of teachers and other employees amount to $25,600,000. For the current year 1934 the board has obligations for teachers' salaries and education expenses in the sum of $25,000,000. There are past-due claims amounting to $3,800,000, making a total of $54,400,000. There is no money in the treasury with which to meet these obligations. In 1930 the General Assembly, recognizing the credit impairment of certain municipalities and the necessity for raising cash to pay current liabilities, enacted a law which provided for the creation of a revolving fund out of the proceeds of the sale of bonds in the sum of $25,000,000. The board of education of Chicago availed itself of that law. In the long duration of the depression the fund so created became exhausted, and in 1933 the legislature added section 134¾ to the School act. (Cahill's Stat. 1933, chap. 122, par. 158 (2) This added section provides that in all cases where the board of education in cities having a population exceeding 500,000 inhabitants shall have heretofore created a working cash fund pursuant to section 134½ of the act, it may incur an indebtedness

for the purpose of increasing such fund and issue bonds therefor in an amount not to exceed $40,000,000. Under conditions and limitations specifically set forth, the proceeds from the sale of the bonds are to be placed in that fund and are not subject to appropriation or budget expense. The board may, however, by resolution direct the transfer of money from that fund to the educational purposes fund. Provision is made for the restoration of the working cash fund from taxes and other revenues, when collected."

The proceeds of the bond issue paid part of the past due obligations of the Board but the financing of current obligations such as teachers' payrolls and other educational expenses including Miller Law pensions presented a problem to the Board of balancing a budget on reduced revenue and required drastic economies. As the teachers' payrolls constituted the major expenses, teachers' salaries were reduced.

The facts as disclosed by the answer of the appellees and the replication filed thereto show that the maximum annual salary of an elementary teacher prior to the adoption of the amendment complained of was reduced as a result of the Board's economy measures to $1,912.50, and that the salary of an elementary teacher in the lower group was reduced to $1,127.50 (R. 115; R. 152-153). Neither the pension paid from the regular Teachers' Pension and Retirement Fund nor the additional pension paid by the Board under the Miller Law out of taxes levied for maintaining the schools were reduced, with the result that the majority of the retired teachers received from both pensions a sum aggregating $2,500.00 per annum, or $587.50 more than the maximum salary received by elementary school teachers and $1,372.50 more than the salary received by teachers in the lower group for conducting classrooms daily (R. 115).

The legislature in adopting the Miller Law of 1935 eliminated the $1,500 per year payment to retired teachers and provided in lieu thereof for the payment of $500 per annum to retired teachers, thus effecting a great annual saving in the board's expenditures and at the same time correcting the then existing unjust condition of payments to each retired teacher in excess of the maximum salary of the active elementary teacher. The effect of the amendment was that the total to be paid from the two pensions to the retired teachers in future installments annually in the great majority of cases was $1,500 per annum. In some few cases it would amount to $1,300 and in others to $1,700 per annum, depending on the date of retirement and length of service.

All pension installments due under the old Miller Law were paid before the Board of Education put the provisions of the Miller Law of 1935 into effect. Appellants herein brought their suit in the Superior Court of Cook County, Illinois, for injunction. The decision of the Superior Court denying the injunction and dismissing the bill was affirmed by the Supreme Court of Illinois.

Appellees' Motion to Dismiss or Affirm.

The appellees, Board of Education of the City of Chicago, *et al.*, have filed a statement in this cause opposing jurisdiction and moving to dismiss, and in the alternative to affirm. An order was entered herein providing that further consideration of the motion to dismiss or affirm be postponed to the hearing of the case on the merits.

SUMMARY OF ARGUMENT.

I.

Miller Law pensions involve no agreement of parties and the grant of them creates no vested right. They may be reduced or changed at any time in the discretion of the legislature.

A. This court has always held without exception that such pensions, payable solely out of public funds are gratuities; that they involve no agreement of parties; that the grant of them creates no vested right and that such benefits may be redistributed or withdrawn at any time in the discretion of Congress.

Walton v. *Cotton,* 60 U. S. 555, 15 L. ed. 658.
U. S. v. *Hall,* 98 U. S. 343, 25 L. ed. 180.
U. S. v. *Teller,* 107 U. S. 64, 27 L. ed. 352.
Frisbie v. *U. S.,* 157 U. S. 160, 39 L. ed. 657.
Lynch v. *U. S.,* 292 U. S. 571, 78 L. ed. 1434.

Such a pension is not analogous to one where the annuitant contributed by deductions from his salary or by actual payment into a retirement fund.

Dismuke v. *United States,* 297 U. S. 167.

B. Miller Law pensions are payable solely out of general taxes levied annually for educational purposes. Teachers contribute nothing either by deductions from salaries or by actual payments into a retirement fund.

Smith-Hurd R. S. 1933, Chap. 122, Par. 614(a), 614(b), 614(c).
Smith-Hurd R. S. 1935, Chap. 122, Par. 614(a), 614(b), 614(c).

The Supreme Court of Illinois has without exception held that (1) pensions are not based on contracts, (2) future installments of pensions are not vested property rights, (3) pensions are mere expectancies based on an anticipated continuance of existing law, and (4) the State may reduce future installments of pensions without violating the provisions of the State or Federal constitution.

Eddy v. *Morgan*, 216 Ill. 437.
Ryan v. *Foreman*, 262 Ill. 175.
Hughes v. *Traeger*, 264 Ill. 612.
Pecoy v. *Chicago*, 265 Ill. 78.
Stiles v. *Board of Trustees*, 281 Ill. 636.
Beutel v. *Foreman*, 288 Ill. 106.
People v. *Retirement Board*, 326 Ill. 579.
People v. *Hanson*, 330 Ill. 79.
McCann v. *Retirement Board*, 331 Ill. 193.
Dodge v. *Board of Education*, 364 Ill. 547.
Raines v. *Board of Trustee's Pen. Fund*, 365 Ill. 610.

The following decisions cited by appellants as supporting the proposition that pensions are vested rights do not so hold.

Hughes v. *Traeger*, 264 Ill. 612.
People v. *Abbott*, 274 Ill. 380.

This was pointed out by Justice Carter in *Beutel* v. *Foreman*, 288 Ill. 106, who also wrote the opinion in *People* v. *Abbott*, 274 Ill. 380.

The following Illinois decisions cited by appellants as supporting their contention of vested rights in a pension are not applicable: *DeWolf* v. *Bowley*, 355 Ill. 530 as it involves no question of vested rights or power of the legislature to alter pension acts; *Porter* v. *Loehr*, 332 Ill. 353,

which merely holds that a pension cannot be increased after retirement because it is extra compensation and therefore violates Section 19, Article 4 of the State Constitution.

C. Courts of other jurisdictions are in accord with the rule laid down by the Supreme Court of Illinois in conformity with the decisions of the United States Supreme Court that there are no vested rights in future installments of pensions payable solely from public funds and to which no contributions are made. The states differ only in what constitutes contribution.

(1) The following states hold that a pension granted by public authorities is not a contractual obligation but a gratuitous allowance in the continuance of which the pensioner has no vested right and which may be changed, modified or reduced in the discretion of the legislature:

Mell v. *State,* 130 O. St. 306.
State ex rel. Zupnik, 131 O. St. 94.
Rudolph v. *U. S.,* 36 App. Cases D. C. 379.
Head v. *Jacobs,* 150 Ky. 290, 150 S. W. 349.
Passaic National Bank & Trust Co. v. *Eelman,* 116 N. J. Law 279, 183 A. 677.

(2) The following states hold that a pension may be reduced after retirement even though contributions are made to a retirement fund:

Holton v. *Tampa,* 119 Fla. 556, 159 S. W. 292.
Trammell v. *City of Dallas* (Tex.), Unreported.
Gibbs v. *Relief Ass'n,* 125 Minn. 174, 145 N. W. 1075.
Casserly v. *City of Oakland,* 6 Cal. (2d) 64.

D. Decisions of the several states relied on by appellants involve situations that are not comparable to that of

the appellants and have no application to pensions such as are provided for under the Miller Law, for the following reasons:

(1) The statute under which pensioners claimed a right provided for contributions to a retirement fund created for that purpose.

Roddy v. *Valentine,* 268 N. Y. 228, 197 N. E. 260.
Dismuke v. *U. S.,* 297 U. S. 167, 80 L. ed. 375.
Trotzier v. *McElroy,* 182 Ga. 719, 186 S. E. 817.
Retirement Board v. *McGovern,* 316 Pa. 161, 174 Atl. 400.
Renz v. *Hibbing Firemen's Relief Ass'n,* 186 Minn. 370, 243 N. W. 713.
Casserly v. *City of Oakland,* 6 Cal. (2d) 64.
Fellows Atty General v. *Connelly,* 193 Mich. 499, 160 N. W. 581.

(2) The court merely decided that the legislature by statute had the authority to provide for a pension scheme for persons in service and no question of any subsequent act of the legislature was involved.

Bowler v. *Nagel,* 228 Mich. 434, 200 N. W. 258.
Matter of Mahon v. *Board of Education,* 68 N. Y. App. Div. 154.
DeWolf v. *Bowley,* 355 Ill. 530.
Fellows, Attorney General v. *Connolly,* 193 Mich. 499, 160 N. W. 581.
Mead v. *Acton,* 139 Mass. 341.
State ex rel. Gorczyca v. *City of Minn.,* 174 Minn. 594.
State ex rel. Stafford v. *State Annuity Board,* 219 Wis. 31.
State v. *Love,* 89 Neb. 149, 131 N. W. 196.

Cobbs v. *Home Ins. Co.*, 18 Ala. App. 206, 91 So. 627.

(3) The particular lump sum payment of pension had accrued and was past due.

Kavanagh v. *Police Commissioners*, 134 Cal. 50, 66 Pac. 36.

(4) The act under which the pensioner claimed a right to a pension was still in force and had not been changed by subsequent acts of the legislature.

Lage v. *City of Marshalltown*, 212 Ia. 53, 235 N. W. 761.

Renz v. *Hibbing Firemen's Relief Ass'n*, 186 Minn. 370, 243 N. W. 713.

II.

The Miller Law amounts to no more than a declaration of legislative policy on pensions and the acceptance of its benefits does not create a contract.

A. The status of tenure teachers is dependent on a statute like that of the incumbent of a statutory office which the legislature at will may change, modify or abolish.

U. S. v. *Hartwell*, 6 Wall. 385.

Hughes v. *Traeger*, 264 Ill. 612.

Phelps v. *Board of Education of the Town of West New York*, Supreme Court Nos. 454, 455, Opinion of March 1, 1937, 81 L. ed. 388.

B. The Miller Law is not an offer that could or did ripen into a contract upon the appellant's retirement.

Salt Mfg. Co. v. *East Saginaw*, 80 U. S. 373, 20 L. ed. 611.

Wisconsin & Michigan Ry. Co. v. *Powers,* 191 U. S. 378; 48 L. ed. 229.

Stanislaus County v. *San Joaquin and K's. R. C. & I.,* 192 U. S. 201; 48 L. ed. 406.

III.

The Miller Law is a local public law, purely governmental, and has to do with State governmental objects and not with any private enterprise thereof

A. The judicial construction of the Miller Act is purely local and not federal, and therefore the decision of the Supreme Court of Illinois thereon is final and not subject to review.

Atkin v. *Kansas,* 191 U. S. 207 (48 L. ed. 148).

Hein v. *McCall,* 239 U. S. 175 (60 L. ed. 206).

Adkins v. *Children's Hospital,* 261 U. S. 525.

B. Not only will this court follow the opinion of a State court in its construction of a state statute, but should the views of the State court be modified or changed, the new holdings will be followed by this court.

Greene v. *Lessee of Neal,* 6 Pet. 291, 8 L. ed. 402.

C. This court is without power to put a different construction upon a state statute from that adopted by the highest court of the state.

Morehead v. *New York ex rel. Tipaldo,* 80 L. ed. 921.

D. It is within the province and privilege of state courts to construe their own statutes, and it is no function of the United States Supreme Court to review such decisions.

Turner v. *Board of Commissioners,* 173 U. S. 461, 43 L. ed. 768.

Jackson ex dem. Hart v. *Lamphire,* 3 Peters 280, 7 L. ed. 679.

Commercial Bank of Cincinnati v. *Buckingham, Executor,* 5 How. 317, 12 L. ed. 169.

IV.

Where a statute is claimed to create a contractual right, this court will give weight to the construction of the statute by the courts of the State. Unless such construction is palpably erroneous, this court will accept the construction placed upon such statute by the State Courts.

Phelps v. *Board of Education of the Town of West New York,* Nos. 454, 455, Supreme Court Opinion of March 1, 1937; 81 L. ed. 388.

Freeport Water Co. v. *Freeport,* 180 U. S. 587.

Tampa Water Works v. *Tampa,* 199 U. S. 241.

Milwaukee Elec. Ry. Co. v. *R. R. Com.,* 238 U. S. 174.

Seton Hall College v. *South Orange,* 242 U. S. 100.

Coombes v. *Getz,* 285 U. S. 434.

ARGUMENT.

I.

Miller Law pensions involve no agreement of parties and the grant of them creates no vested right. They may be reduced or changed at any time in the discretion of the legislature.

We pointed out in our Statement Opposing the Jurisdiction and Motion to Dismiss or Affirm, heretofore filed herein, that the Federal question attempted to be asserted by appellants is foreclosed by previous decisions of this court, which has uniformly held that statutes providing for pensions or providing for tenure in office do not create contracts.

Section 1 of the Miller Act, effective 1926, provided for the compulsory retirement of teachers from active service according to a schedule. It related solely to retirement and pensions are not mentioned. Its validity is not challenged.

Section 2 provides that upon such retirement each of said retired teachers should receive $1500 annually from money to be derived annually from the general tax levies for educational purposes. Section 2 further provided that nothing in the Act contained should "in any way impair or prejudice any rights of a teacher, * * * so retired to annuity under other statutory provisions concerning any teachers' pension fund or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State; and shall not repeal or modify any other such statutory provisions."

When the Act was amended in 1927, Sections 1 and 2 remained as before; but a new section, Section 3, was added

providing for a pension to be paid to those, who voluntarily retired at ages between 65 and 70 years, and repeated therein the provision already found in Section 2 (reserving rights under the Teachers' Pension and Retirement Fund) providing that the payment "to be made under this section of the Act which it amends shall be in addition to any such annuity." This amendment also broadened the title of the Act. This Act was again amended in 1929, making minor changes in Section 3 not involved in this suit. Neither the compulsory retirement feature of the Act nor any other of its provisions were challenged and the Board in accordance with the terms of this Act of 1926, as amended in 1927 and 1929, continued to make the payments required solely out of moneys collected from taxes levied annually for educational purposes.

The Act makes no provision for the establishment of a fund out of which such payments can be made. It does not require any contributions from teachers and none have been made, either voluntarily or by way of salary deductions.

Since the Act does not provide for contributions, these Miller Law pensions are identical with the old pensions which this court has consistently held could be given, withheld, distributed or recalled at the discretion of the legislative bodies which created them.

United States Supreme Court Decisions.

In the case of *Walton* v. *Cotton,* 60 U. S. 555, 15 L. ed. 658, the court held that a pension of the character just described was "undoubtedly a bounty." In *United States* v. *Hall,* 98 U. S. 343, 25 L. ed. 180, the court reached the same conclusion.

Whether or not Congress could pass a law cutting off a pension that a person was receiving pursuant to a prior act was before this court in *United States* v. *Teller*, 107 U. S. 64; 27 L. ed. 352. The court held that the pensioner had no vested right to the pension under the earlier Act, which could not be cut off by subsequent legislation and in so holding said:

> "It was competent for Congress to pass this Act. No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion."

This principle of law strictly adhered to by this Honorable Court is also the law in Illinois and has never been departed from by the Illinois courts.

Appellants cite the case of *Pennie* v. *Reis*, 132 U. S. 464, 33 L. ed. 426, contending that the language in that case states their position in the case at bar. We respectfully submit that instead of supporting appellants' contention that there is a vested and contractual right in future installments of pensions, the case holds squarely to the contrary.

On page 471, the court said:

> "The direction of the State, that the fund should be one for the benefit of the police officer or his representative under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided."

In considering this decision, Mr. Justice Stone, speaking for the Supreme Court of Illinois in the case at bar, *Dodge* v. *Board of Education of the City of Chicago*, 364 Ill. 547,

distinguishes lump sum pensions due upon death from installment pensions, as follows (page 555):

> "The difference in nature between a lump sum pension or award and a continued pension is obvious and is sufficient to mark the difference in the rule with reference to interest therein as found in the decisions of the courts. Under a statute such as the one in *Pennie* v. *Reis, supra,* where, on the happening of a certain event a certain sum of money became due, the interest of the beneficiary when such event takes place is analogous to the interest of a pensioner whose installment or pension has become due under the terms of a pension act. *Pennie* v. *Reis, supra,* does not in any way militate against the rule generally adopted, that pension acts do not create in their beneficiaries a vested interest in future installments of the pensions created thereby."

Another case wherein this court was called upon to determine whether a pension created a vested contractual right was *Frisbie* v. *United States,* 157 U. S. 160, 39 L. ed. 657. The court, on page 166, states:

> "The pension granted by the Government is a matter of bounty. 'No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion.' *Walton* v. *Cotton,* 60 U. S. 555, 19 How. 355 (15:658); *U. S.* v. *Teller,* 207 U. S. 64, 68 (27:352, 354)."

In 1934, this court decided the case of *Lynch* v. *United States,* 292 U. S. 571, 78 L. ed. 1434, wherein it pointed out the distinction between benevolent purposes pensions, such as the one granted by the Miller Law, and annuities payable under a statute providing for war risk insurance under the terms of which the insured paid premiums provided for in a written contract or policy. Although this case was cited by appellants in their jurisdictional

statement, we find that they failed to cite it in their brief in support of their claim of contractual vested rights. The reason is obvious.

On page 577, the court said:

> "* * * Pensions, compensation, allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *U. S.* v. *Teller,* 107 U. S. 64, 68 (27 L. ed. 352, 354) 2 S. Ct. 39; *Frisbie* v. *U. S.,* 157 U. S. 160, 166 (39 L. ed. 657, 659) 15 S. Ct. 586; *U. S.* v. *Cook,* 257 U. S. 523, 527, (66 L. ed. 350, 351) 42 S. Ct. 200."

Dismuke v. *United States,* 297 U. S. 167, (80 L. ed. 375) cited by appellants, involved a federal retirement act and the court held that the proviso in the Tucker Act withholding jurisdiction of suits on claims for pensions did not deprive the District Court of jurisdiction of claims under that retirement act as "the annuitant contributes to them by deductions from his salary or by actual payments into the fund" (p. 170). As we pointed out heretofore, the Miller pension grants come solely out of taxes annually levied for educational purposes and the teachers make no contribution whatever either by deductions from salaries or by actual payments into a fund.

Claims similar to those of appellants here of the establishment of vested contract rights by legislative action were asserted in the cases of *Phelps* v. *Board of Education of the Town of West New York,* case No. 454, and *Lucy Askam, et al.* v. *Board of Education of the Town of West New York,* case No. 455, in which an opinion was rendered by this Honorable Court on March 1, 1937, and is there-

fore not yet published in the Supreme Court reports. In those cases it appears that the teachers were employed for a period of three years, under yearly formal contracts, after which time they were granted by the statute tenure during good behavior and the Board was prohibited from dismissing a teacher or reducing her salary except for cause upon written charges. The legislature of the State authorized a reduction of salary and the school board, pursuant to such statute, reduced the teachers' salaries. The court held that the original statute was but a mere regulation of the conduct of the Board and did not constitute a continuing contract of indefinite duration with the individual teacher, and in so holding this Honorable Court said:

> "Although after the expiration of the first three years of service the employe continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the Board was bound by contract with the teacher for more than the current year. The employe assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the Board, a creature of the state, from reducing the teacher's salary or discharging him without cause, *we agree with the courts below that this was a mere regulation of the conduct of the Board and not a term of continuing contract of indefinite duration with the individual teacher.*" (Italics supplied.)

We respectfully submit that if a statute such as was before this Honorable Court in the *Phelps* case, *supra,* which prohibited the reduction of salaries or discharge without cause, was but a mere regulation of the conduct of the Board, and if the teacher did not acquire by that statute vested contractual rights in her position or salary, then a

statute such as the Miller Law here before the court is likewise a declaration of a policy or regulation of conduct that may be altered and changed by the State in its discretion.

Moreover, this court has consistently held, without exception, that where a person is placed on a pension roll under a benevolent purpose act such as the one under consideration, which act provides for no fund and for no contribution by beneficiaries, either by deductions from salary or actual payments made into a fund, no contract is created and therefore the grant of such pensions creates no vested rights. This court has always held that the benefits conferred by such acts may be changed, modified or reduced at the discretion of the legislative body which created such benefit. It follows, therefore, that the legislature in enacting the Miller Law of 1935, violated no contractual or vested property rights of any of the appellants in future installments of Miller Law pensions.

Illinois Decisions.

The courts of Illinois following the decisions of this court, notwithstanding counsel's assertion to the contrary, have consistently held that pensions like the one involved in the case at bar are at all times subject to the control of the legislature. This was emphasized by Mr. Justice Stone, who, when rendering the unanimous opinion for the court below, on page 554, said:

> "The doctrine, as we have seen, is thoroughly established in this State that the State may control the giving or taking away of pensions, * * *" (*Dodge* v. *Board of Education,* 364 Ill. 547).

On page 43 of appellants' brief the statement is made that until the decision in the Supreme Court of Illinois

in the instant case, the Illinois law appeared to be settled that an annuity or a pension was not a gratuity but was a vested right, yet in their brief, page 47, appellants set up a list of seven Illinois Supreme Court decisions viz:

Eddy v. *Morgan,* 216 Ill. 437.
Ryan v. *Foreman,* 262 Ill. 175.
Pecoy v. *Chicago,* 265 Ill. 78.
Stiles v. *Board of Trustees,* 281 Ill. 636.
People v. *Retirement Board,* 326 Ill. 579.
People v. *Hanson,* 330 Ill. 79.
McCann v. *Retirement Board,* 331 Ill. 193.

which they concede hold that pensions are bounties springing from the graciousness of the sovereign which may be given or taken away at the discretion of the legislature.

Appellants' case here is the same as it was in the court below, and is stated in the opinion of that court at page 550 as follows:

> "As is stated by counsel for appellants in their reply brief: 'Appellants' case rests upon the proposition that they have vested property rights to the payment of future installments of the annuities on the basis fixed by the law in force at the time they retired, or being entitled to retire made application for retirement.'"

The Supreme Court of Illinois has many times been called upon to construe pensions and has without exception consistently held that there are no vested rights in future installments of pensions.

The leading case on this proposition is *Beutel* v. *Foreman,* 288 Ill. 106. In this case it appears that one Beutel, on March 31, 1917, after having completed a service of

twenty (20) years as a member of the police force, filed application for a pension. On July 12, 1917, his application was denied on the ground that the Police Pension Fund Act as amended on July 1, 1917, provided that no policeman should be pensioned after a service of twenty (20) years until he should have reached the age of fifty (50) years. Beutel had not reached the age of fifty (50) years on July 1, or on July 12, 1917. It was therefore contended that under the amendment to the Pension Act effective July 1, 1917, he was not entitled to receive a pension.

It will be noted that the Pension Act in force prior to July 1, 1917, contained no fifty (50) year age requirement. In other words, the Pension Act in force on March 31, 1917 (the date of Beutel's application and the date according to appellants' theory when rights vest) did not require that the pensioner be fifty (50) years of age at the time of retirement. The amendment of July 1, 1917, did make such requirement.

It was earnestly contended in that case, as in the case at bar, that the event happened which vested his right to the pension on March 31, 1917 (petitioner having served the required period entitling him to a pension), before the law was revised; that he had made his application for retirement and hence the legislature could not take away that vested right to receive a pension by subsequent legislation without violating his vested property right protected by the Constitution. The court stated the position of the petitioner in that case as follows (page 109):

> "Counsel for defendant in error earnestly insist that the Pension act in force previous to July 1, 1917, gave him a contract and property right in his pension at the time he filed his application for the same, and therefore the amendment in question must be held to

be unconstitutional because of violating a property right vested in him."

Counsel in the case at bar contend that since the teachers had completed the service, which under the old Miller Law entitled them to $1,500 pensions, they acquired fixed rights under it which could not be changed without violating the state and federal constitutions.

In the *Beutel* case, the police officer also had completed the service required under the law then in force and several months before it was changed had filed his application for the pension provided by the Act.

In holding that no constitutional right of the claimant was violated by the legislature, the court, on page 109, said:

> " 'But a right to be within its protection must be a vested right. It must be something more than a mere expectation, based upon an anticipated continuance of the existing law.' "

On page 112 the court further stated:

> "A full discussion of the question of vested rights in pension funds is found in *Gibbs* v. *Minneapolis Fire Department Relief Ass'n,* 37 Ann. Cas. 1915C, 749, (125 Minn. 174) and in the exhaustive note following the opinion. It was argued there, as here, that the right of a person claiming a pension was a vested one, and the opinion quoted from another decision with approval, as follows: 'The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable after a party enters the service, either before or after the right to a pension accrues. * * * It also follows that while there is no vested right in a pension which cannot be divested by the mere exercise of the legislative will, if relators have any rights they are vested ones so long, only, as the statute in question remains in force and unchanged, subject to be divested at any

time that Congress may desire.' See also, *Stevens* v. *Minneapolis Fire Department Relief Ass'n.*, 50 L. R. A. (124 Minn. 381,) 1018, and note reviewing the authorities; 21 R. C. L. 242; 2 McQuillin on Mun. Corp. sec. 511; 5 *id.* sec. 2422.

We can reach no other conclusion in this case than that by the great weight of authority in this and other jurisdictions, as between the State and the members of the police department of one of the municipalities in this State, the State may take the right of pension away, under such circumstances as shown by this record, without affecting the contract right of the pensioners or violating the constitution."

The Illinois Supreme Court had occasion in *People* v. *Hanson,* 330 Ill. 79, to reiterate with approval the principles laid down in the *Beutel* case, *supra.*

In the *Hanson* case plaintiff in April, 1917, after having completed 20 years of service, made application for pension pursuant to the law in force at that time which provided for pension equivalent to one-half of officer's salary upon completion of 20 years of service. In June, 1917, the Act was amended by the legislature effective July 1, requiring applicant to be 50 years old. On July 12, 1917, the trustees denied his application as he was not 50 years old. In February, 1918, the Board placed his name on the roll from the date of his retirement until June 30, 1917. In September, 1921, the petitioner and others similarly situated entered into a compromise agreement whereby in consideration of the payment of a sum of money they released their claims to all back pensions and were reinstated on the pension roll as of August 1, 1921, and pensions were to be paid to them continuously thereafter.

The pension was paid to petitioner until June 29, 1925, when the Board struck his name off the roll and directed

no further money be paid to him until he paid back all money paid him for the period prior to his attaining 50 years of age. This was done pursuant to an amendment passed in 1925, authorizing the Board to retain out of future payments any money paid to a pensioner through misrepresentation, fraud and error.

As stated by the court in its opinion (page 84), the questions of law raised were:

1. Was petitioner's right to a pension an expectancy, or did it become a vested right under the law in force at the time of his retirement and application for a pension?
2. Was the compromise agreement of September, 1921, an accord and satisfaction?
3. Was the Act of 1921 in violation of section 13 of Article 4 of the Constitution?
4. Was the amendatory Act of 1925 constitutional?

The court, on page 89, held:

> "The objection in the *Retirement Board* case to the amendment of 1925 was, that it contravened section 1 of the fourteenth amendment to the constitution of the United States and section 2 of article 2 of the constitution of this state. The court said: 'This contention cannot be sustained. As against the State or its political subdivisions there is no vested right in a pension accruing in the future from month to month. (*Beutel* v. *Foreman,* 288 Ill. 106; *Gibbs* v. *Minneapolis Fire Department Relief Ass'n,* 125 Minn. 174, 145 N. W. 1075.) A pension is a bounty springing from the appreciation and graciousness of the sovereign and may be given or withheld at its pleasure. (*Eddy* v. *Morgan,* 216 Ill. 437.) There is no contract on the part of the State to continue the payment of a benefit or annuity, and a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the consti-

tutional provisions invoked.—*Pennie* v. *Reis*, 132 U. S. 464, 10 Sup. Ct. 149; *Pecoy* v. *City of Chicago*, 265 Ill. 78.'"

The court, in discussing the question as to whether the compromise agreement of 1921 was an accord and satisfaction, of necessity had to consider whether or not any contract rights were involved, and in holding that there were none, on page 91 said:

> "By the compromise agreement of September, 1921, petitioner and others similarly situated accepted a much less sum to be prorated among them than they claimed was due and released the retirement board from all claims on account of back pensions from July 1, 1917, to August 1, 1921. Counsel for petitioner insist the law relating to accord and satisfaction is applicable and that the compromise agreement should be sustained under the law relating to that subject. We do not think the doctrine of accord and satisfaction applicable to this character of cases. This court has repeatedly held that no contract right of petitioner existed. Petitioner's claim did not arise out of a contract or from an alleged tort. 'An accord and satisfaction is a method of discharging a contract or settling a cause of action either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement.'"

The Illinois Supreme Court again passed upon the question whether or not there was a vested right in future installments of pensions in the case of *McCann* v. *Retirement Board*, 331 Ill. 193. In that case, McCann filed a petition for writ of mandamus against the Retirement Board to compel it to pay him a pension of $1,750 annually, which was fifty per cent of his salary at the time of his retirement. This claim was based upon Section 55 of an Act which was in effect at the time he retired.

On October 1, 1923, he was retired under the Act of 1921 then in effect at a pension of $1,750 annually, which was paid until November, 1924. Then the Board reduced the annuity to $1,300 annually, the maximum pension permitted to be paid pursuant to a subsequent amendment.

The court held on page 200:

> "The amendment of 1927 was, and was intended to be, retroactive, and by it no policeman who resigned or was discharged prior to July 1, 1927, was entitled to be paid an annuity or pension computed or based upon any salary in excess of $2600. The right to a pension is not a vested right. *People* v. *Retirement Board*, 326 Ill. 579; *Beutel* v. *Foreman*, 288 *id.* 106; *Pecoy* v. *City of Chicago*, 265 *id.* 78; *Hughes* v. *Traeger*, 264 *id.* 612."

In each of the Illinois cases we have cited, the pension statutes created a fund out of which the pension involved should be paid and it was claimed that a vested interest in that fund existed. The courts held to the contrary. It must be borne in mind that the Miller Law created no pension fund and that there is no fund in which the appellants can claim a vested interest.

The case of *People ex rel. Donovan* v. *Retirement Board*, 326 Ill. 579, cited with approval in the *McCann* case, was a mandamus suit against the Retirement Board of the Policemen's Annuity & Benefit Fund of Chicago to restore the widow of a policeman to a pension roll and pay her compensation as provided by the Act of 1921.

Though the court held that the appellee was entitled under the facts in the case to the compensation annuity as opposed to the finding of the pension board, nevertheless it adhered to the long established line of cases holding that the legislature had the right to amend a pension act pro-

viding for payment of installments in the future, and on page 582 said:

> "Appellee contends that this section, insofar as it affects awards made prior to July 2, 1925, contravenes section 1 of the fourteenth amendment to the constitution of the United States and section 2 of article 2 of the constitution of this State. This contention cannot be sustained. As against the State or its political subdivisions there is no vested right in a pension accruing in the future from month to month. (*Beutel* v. *Foreman*, 288 Ill. 106; *Gibbs* v. *Minneapolis Fire Department Relief Ass'n*, 125 Minn. 174, 145 N. W. 1075.) A pension is a bounty springing from the appreciation and graciousness of the sovereign and may be given or withheld at its pleasure. (*Eddy* v. *Morgan*, 216 Ill. 437.) There is no contract on the part of the State to continue the payment of a benefit or annuity, and a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the constitutional provisions invoked."

Notwithstanding the unequivocal language used in the long line of cases just cited, which consistently adhere to the principle that there is no vested right in a pension accruing in the future from month to month, counsel contend that expressions used by the Illinois Supreme Court in holding general pension laws valid are to be construed as indicating a departure from such principles. In support thereof they cite *Hughes* v. *Traeger*, 264 Ill. 612, *People* v. *Abbott*, 274 Ill. 380, *Porter* v. *Loehr*, 332 Ill. 353, and *DeWolf* v. *Bowley*, 355 Ill. 530.

In the case of *Beutel* v. *Foreman*, 288 Ill. 106, the court in disposing of a similar argument made by counsel in that case, at page 110 said:

"Counsel are in error in their argument that the decisions of this court last referred to (*Hughes* v. *Traeger,* 264 Ill. 612, *People* v. *Abbott,* 274 id. 380) intended to hold that the right of a pension was a vested right."

The court in the *Beutel* case went on to say that the court had particularly stated the opposite and cited numerous cases to show that by the use of such language, it was not intended to hold that there was such a thing as a vested right in a pension. The opinion in the case of *Beutel* v. *Foreman, supra,* was written by the same justice who wrote the opinion in the *People* v. *Abbott* case, *supra.*

The case of *Porter* v. *Loehr,* 332 Ill. 353, does not involve the question of decreasing a pension but merely decides that a pension or an increase in pension cannot be given to a person who is no longer in the service, because it is an extra compensation and therefore in violation of Section 19 of Article IV of the Constitution of Illinois, which prohibits the General Assembly from granting or authorizing extra compensation, fee or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made. What the court did say about pensions appears on page 359 as follows: "The establishment and maintenance of a system of pensions is not a public duty or obligation—it is merely a question of policy, to be determined by a lawmaking body." This case does not hold directly or indirectly that there is any vested property right in future pension installments.

In the case of *DeWolf* v. *Bowley,* 355 Ill. 530, cited by appellant, there was no question of vested property rights or power to alter, reduce or withdraw a pension.

The Supreme Court of Illinois in a very recent decision (rendered since its opinion in the case at bar), *Raines* v.

Board of Trustees Pen. Fund, 365 Ill. 610, construed an act of the Illinois Legislature of 1935 amending the Illinois State Teachers' Pension and Retirement Fund Act (Smith-Hurd Revised Statutes, Chap. 122, Par. 578-612), applying to the smaller school districts and cities in Illinois. In that case it reaffirmed all its previous holdings to the effect that a pension payable solely out of public funds is in the nature of a bounty that may be given, withheld, distributed or recalled at the pleasure of the Legislature.

As this decision is the last word from the Supreme Court of Illinois on the subject of pensions, we take the liberty of quoting at length from the opinion (pp. 614 to 616).

> "The whole difficulty in this case arises from a failure to distinguish between a pension fund and an annuity fund derived in part from voluntary contributions made under a statutory option to contribute or refrain from contributing. A pension is in the nature of a bounty springing from the appreciation and graciousness of the sovereign, and may be given, withheld, distributed or recalled at its pleasure. (*People* v. *Retirement Board,* 326 Ill. 579; *Porter* v. *Loehr,* 332 *id.* 353; *Pecoy* v. *City of Chicago,* 265 *id.* 78.) For this reason it is held that a pensioner has no vested right in a pension fund. It has also been held that the character of a pension fund is not changed by compulsory contributions by way of exactions from the salaries or wages of public officers and employees. It is said that such payments into the fund are not in fact payments by the officer or employee, and the employment is accepted with knowledge that certain amounts will be deducted each month and placed in the pension fund; that the money is not first segregated from the public fund so as to become private property and then turned over to the pension fund, but is set aside or transferred from one public fund to another, and remains public money over which the person from whose salary it is

deducted has no control, and in which he has no right. *Pecoy* v. *City of Chicago, supra; Hughes* v. *Traeger,* 264 Ill. 612; *Pennie* v. *Reis,* 132 U. S. 464, 33 L. ed. 426; *State* v. *Policemen's Pension Fund,* 121 Wis. 44, 98 N. W. 954.

Because of these principles, we have held that policemen from whom compulsory contributions had been exacted by statute for a police pension fund, and who had retired on a pension, were not entitled to an increase thereof under a statutory amendment adopted after their retirement. (*Porter* v. *Loehr, supra; People* v. *Abbott,* 274 Ill. 380.) We pointed out that such an increase is an appropriation of public funds for the benefit of individuals and a gift or gratuity having for its sole basis or justification the services rendered prior to their retirement; and that such an allowance violates section 19 of article 4 of the Constitution prohibiting extra compensation, fee or allowance to any public officer, agent or servant, after the service is rendered. Such holdings are predicated upon the nature of the fund as being purely a pension fund unchanged in its nature by compulsory so-called contributions. Such a fund remains at all times public money to be dispensed as a gratuity or withdrawn at will devoid of any right in the pensioner.

There is a wide difference between voluntary contributions to a fund under a statutory elective right and being compelled to suffer deductions without any such right. In the latter case the officer or employee has no voice in determining whether or not he will suffer such exactions. They are imposed by the statute and deducted even if against his will. In the other case it is wholly a matter of choice with him. He may elect to come within the terms of the act and receive its benefits, or he may forego that privilege at his option, with no other effect than to deprive him of participating in the fund. If he does not elect to contribute, he receives and retains the full amount of his salary or wages. If he elects to contribute, the amounts are deducted by his direction. The effect is the same as if his full salary were paid to him and after it became his pri-

vate means he in turn contributed to the retirement fund. In such case there is neither reason nor authority to hold that the fund remains public money in which he has no right or interest.

Under statutes creating teachers' retirement funds by which it is optional with the teachers to come under their provisions by having a certain sum deducted from their salaries, it is held that the election to participate in the fund raises a contractual relation, the terms of which are ascertained by reference to the statute. *Ball* v. *Board of Trustees of Teachers' Retirement Fund,* 71 N. J. L. 64, 58 Atl. 111; 24 R. C. L. Schools, sec. 79; *In re Sanborn,* 159 Wash. 112, 292 Pac. 259."

In *Dodge* v. *Board of Education, Beutel* v. *Foreman, People* v. *Hanson, People* v. *Retirement Board* and *Raines* v. *Bd. of Trustees Pen. Fund, supra,* the Supreme Court of Illinois has consistently held that as against the State or political subdivision, there is no vested right in a pension accruing in the future from year to year as provided for under the Miller Law and there is no contract on the part of the State to continue the payment of such a pension. The change in the law affecting such pension does not impair the obligation of a contract or deprive a person of property without due process of law within the meaning of the constitutional provisions invoked by appellants.

No case in Illinois overrules or modifies the principles laid down by the case of *Beutel* v. *Foreman,* 288 Ill. 106. These principles are affirmed in all of the pension cases involving the question of vested rights which have been determined by the Illinois Supreme Court since that decision was handed down. In the instant case the court below as we pointed out heretofore, stated that "The doctrine as we have seen is thoroughly established in this State

that the State may control the giving or taking away of pensions." All of the pension cases in Illinois, we respectfully submit, uniformly hold (a) that pensions payable solely out of public money are not based on contracts, (b) that future installments of such pensions are not vested property rights, (c) that they are mere expectancies based on anticipated continuation of existing law and (d) that the State may reduce future installments of such pensions without violating the provisions of the State or Federal Constitution.

Decisions in States Other Than Illinois.

The courts of other jurisdictions are in accord with the rule laid down by the Supreme Court of Illinois in conformity with the decisions of this Court and hold that there are no vested rights in future installments of pensions payable solely out of public moneys.

In Ohio pensions are held to be gratuities and not contracts creating vested rights. The leading case on that subject is *Mell* v. *State, ex rel.*, 130 Ohio St. 306 (decided December 18, 1935). The question involved in that case was whether the Board had a right to reduce the pensions of those already on retirement.

The Supreme Court of the State of Ohio held that a pension was a gratuity, subject to the control of the donor and such pension was created by law rather than by contract and granted to the relator no vested rights. In so holding the court said on page 309:

> "A pension is generally defined as a gratuity, at all times subject to the will of the donor. It is a creature of law rather than of contract, and the pensioner has no vested right in the continuance of a gratuitous allowance.

'The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor, either in whole or in part.' 21 Ruling Case Law, 242. See also *Walton, Admr.* v. *Cotton,* 60 U. S. (19 How.), 355, 15 L. Ed. 658; *United States* v. *Teller,* 107 U. S. 64, 2 S. Ct., 39, 27 L. Ed., 352; *Pennie* v. *Reis,* 132 U. S. 464, 10 S. Ct., 149, 33 L. Ed., 426; *Frisbie* v. *United States,* 157 U. S., 160, 15 S. Ct. 586, 39 L. Ed., 657; *Gibbs* v. *Minneapolis Fire Dept. Relief Assn.,* 125 Minn., 174, 145 N. W., 1075, Ann. Cas., 1915C, 749, and note.

'Pensions * * * are gratuities. They involve no agreement of parties; and the grant of them creates no vested right.' *Lynch* v. *United States* (1934), 292 U. S. 571, 54 S. Ct., 840, 78 L. Ed., 1434. To the same effect, *Gibbs* v. *Minneapolis Fire Dept. Relief Assn., supra.*''

The court further said that pensions are gratuities even where the pensioner had made compulsory contributions to the fund (quoting *Pennie* v. *Reis, supra*), and held that the right to a pension not being a vested one a pension board could in its discretion modify or alter the pension, and in so holding on page 310 said:

''The right to a pension not being vested, the board has a right at any time, in its discretion, to modify or alter pension awards by increasing or decreasing them, so long as it acts reasonably and not in an arbitrary fashion. This right the board may exercise pursuant to and under its own rules and regulations then prevailing, and, in the absence of abuse, mandamus will not issue to control its discretion.

The board has not acted illegally in effecting a reduction of relator's pension. We find no abuse of discretion.''

This holding was reaffirmed by the Supreme Court of Ohio in a decision rendered April 29, 1936, in the case of *State, ex rel.* v. *Zupnik,* 131 Ohio St. 94.

In the case of *Rudolph* v. *United States, ex rel. Stuart,* 36 App. Cases, D. C. 379, at page 384, the court said:

> "The statute differs from a contract in that the government may withdraw the benefits conferred at any time it may deem advisable, after a party enters the service, either before or after the right to a pension accrues. * * * It also follows that, while there is no vested right in a pension which cannot be divested by the mere exercise of the legislative will, if relators have any rights, they are vested ones so long only as the statute in question remains in force and unchanged, subject to be divested at any time that Congress may desire."

In Kentucky the holding is the same. In *Head* v. *Jacobs,* 150 Ky. 290, it appeared that a pension act was adopted March 3, 1904, providing for pensions to policemen. The relators were on pension under that act. In 1912 the General Assembly passed an act repealing the former Act and enacting another law which was to take the place of it, and provided that all pensions then in force under the law theretofore existing be declared ended and abolished. It further provided that the pensions and benefits under the old Act be continued as such by the Board organized under the new Act, if, under the terms of the new Act they would be entitled to apply for and receive pensions or benefits. The Board of Pensions declined to transfer the relators to the new roll and they brought suit to compel the Board to do so. The only question to be determined was whether the applicants were entitled as a matter of right to be transferred to the new pension roll.

The court held that they had no such right and said on page 293:

> "A pensioner has no vested right to his pension; the legislature which created it can recall its bounty at its discretion (22 Am. & Eng. Ency., 658). The act of 1912 taken as a whole shows a clear legislative purpose to allow no pension except to those disabled by reason of service in the department where the disability was contracted through such service, and to commit to the discretion of the board the question, what existing pensions should be transferred to the new roll."

We have pointed out heretofore that all the pension installments which accrued under the Miller Law, as in force prior to the amendment in July, 1935, had been paid in full.

The Supreme Court of the State of New Jersey points out in the case of *Passaic National Bank & Trust Company* v. *Eelman*, 116 N. J. Law, 279, 183 A. 677, that the obligation to pay the periodic installment of pensions continues only by force of the statute, and that the legislature may repeal or modify it and thus relieve itself of payments which might arise *in futuro*. This we contend is the effect and the result sought by the pasasge of the Miller Law in 1935.

The court, in distinguishing between past due or accrued installments where rights vest and future installments of pensions where no rights vest said on page 680 (183 Atl.):

> "* * * The rule is that compulsory deductions from the salaries of government employees, by the authority of the government, for the support of a pension fund, creates no contractual or vested right between such employees and the government, and neither the employees, nor those claiming under them, have any rights except as are conferred by the statute creating and governing the fund. But where the pension in-

> stallments mature, the right of the pensioner to payment thereof vests. *Plunkett* v. *Board of Commissioners of Hoboken*, 113 N. J. Law, 230, 173 A. 923, affirmed 114 N. J. Law, 273, 176 A. 341; *Pennie* v. *Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426. This is an obligation imposed by the subsisting statute maintaining and governing the pension fund, and logically falls into the category of obligations enforceable in an action of debt at the common law."

With reference to the termination of the right to future installments of pensions the court said on page 680 (183 Atl.):

> "While the pension statute subsists, the obligation to pay the periodic installments continues by force thereof. I can perceive no rational basis for a distinction, in respect of this special execution statute, between installments payable under the Pension Act and a contract of hire. The obligation to pay the pension is fixed while the statute exists. While the Legislature may repeal or modify the act, and thus terminate the pensioner's right to unaccrued installments, so may the private employer terminate the contract of hire for an indefinite term, and thus relieve himself of obligations to arise *in futuro*. But the installments of salary or wages that may accrue while the contract subsists are nevertheless subject to this form of execution."

Appellants cite California cases in support of their contention that the courts of California are not in accord with the general rule that pensions are mere bounties, and not subject to the control of the legislature. The reason for such a ruling is made clear in the California case of *Dryden* v. *Board of Pension Commissioners of the City of Los Angeles, et al.*, 6 Cal. (2d) 575, 59 Pac. (2nd) 104.

It is apparent that in California the employees actually contribute to a fund and that this contribution is made an

integral portion of the contract of employment. Thus the court on page 578 said:

> "The deceased was a member of the police department for approximately fourteen years before his death, during the entire period of which he paid his required 4 per cent of each salary check received. A pension based upon such facts is not a gratuity. It is a periodical allowance of money granted by the city in consideration of services rendered or of loss or injury sustained, and payments actually made for that purpose."

Another case cited by appellants is *Casserly* v. *City of Oakland,* 6 Cal. (2d) 64. It appears in that case that the fund out of which the pensions were paid was made up in part by contributions of the pensioners. The court held that the amount of the pension received on retirement was not vested so as to prevent a subsequent reduction.

Appellants cite the case of *Lage* v. *City of Marshalltown,* 212 Iowa 53, as holding that a similar statute to the statute involved herein creates vested contractual rights. This decision in no way supports that contention. The facts differ materially from those in the case at bar. In the *Lage* case, the pension law under which plaintiff claimed money was still in full force and effect, never having been revised, repealed or amended, and the only question involved was the right of the plaintiff to recover in assumpsit for a past due pension installment unpaid because of the failure of the city to make the necessary tax levy for that purpose.

The court held that inasmuch as the right to the payment of an installment of a pension was not based upon a contract, that such action would not lie and that the remedy was in mandamus to compel the levy of a tax for pension purposes.

Appellants cite the case of *State ex rel. Stafford* v. *State A. & I. Board,* 219 Wis. 31, in support of their theory that pensions cannot be reduced by a subsequent statute without impairing the obligation of a contract created under the prior statute. An examination of this Wisconsin case discloses that this question was in no way before the court. There was no second statute which it was claimed impaired the obligation of a prior one. The only point involved was whether or not the pension fund was liable to the estate of a deceased employee for the amounts the employee had paid into the fund during his lifetime. The court held that the fund was discharged from any liability upon the death of the contributor.

Another case cited by appellants in support of their theory of vested rights in pensions is *Retirement Board* v. *McGovern, et al.,* 316 Pa. 161. The case states that where the pension is payable out of a contributed reserve retirement system the law is different. (The Miller Law does not provide for any such fund and no contributions are made.) On this point the court on page 170 said:

> "Where an allowance is made out of hand, gratuitously, and purely for past services, by the government, it is a pension, with all the attributes of a pension; but where the employee contributes a part of his salary or wages with a sum from the State or county under a quasi contractual relationship with the municipality or State, creating a contributed reserve retirement system, the results are different, retirement pay made therefrom is not a pension: the contributions by the government, from their very nature, must be viewed in a different light."

The case of *Fellows, Attorney General* v. *Connelly,* 193 Mich. 499, cited by appellants, we respectfully submit throws no light whatsoever upon the issues in the case at

bar. The effect of subsequent acts of the general legislature was in no way involved. The point before the court was the legality of an act requiring contributions from teachers to a pension fund.

Renz v. *Hibbing Firemen's Relief Association*, 186 Minn. 370, cited by the appellants as a case construing a similar statute and holding that a vested right is created by such statute, we submit does not support such a contention. First, because the pension fund there involved was one to which the pensioner contributed, and second, because it did not involve a revision or change in a pension statute. The only question in that case was whether the pension board under its by-laws, which provided, among other things, "trustees shall have power to wholly revoke and annul the same whenever the physical condition which was the cause of the pensioning of such member, no longer exists" had the power to revoke or annul a disability pension previously allowed, and to require that the pensioner prove that his physical condition was such as to entitle him to continue to receive the pension. The court held that the burden of proving that there had been a change in the pensioner's condition warranting a revocation of the pension was on the trustees and his pension could not be taken away from him without giving him an opportunity to be heard.

Kavanagh v. *Board of Police Commissioners*, 134 Cal. 50, cited by appellants, is a case involving a pension where the particular payment was past due and unpaid when the statute was amended. It is conceded that there were no past due and unpaid installments of pensions when the Miller Law became effective.

Trotzier v. *McElroy,* 182 Ga. 719, involves a pension payable out of a fund to which the petitioner had contributed one per cent of his salary during the time he was employed whereby as the court points out in the quotation on page 724, "the right acquired by the firemen are analogous to those possessed by members of mutual benefit societies. 28 Cyc. 555." We believe that nothing further need be said with reference to this case.

To the same effect is *Roddy* v. *Valentine,* 268 N. Y. 228, cited by appellants. There the pensioner had made contributions into the fund from which the pension was paid.

Bowler v. *Nagel,* 228 Mich. 434, cited by appellants, merely holds that the municipality had not the power to provide old age pensions for employees; that this authority must be conferred by statute.

In *Matter of Mahon* v. *Board of Education,* 68 N. Y. App. Div. 154, cited by appellants, the only point involved was the validity of an act conferring a pension upon teachers who had resigned before the pension was created.

Mead v. *Acton,* 139 Mass. 341, involves the validity of an act of the State of Massachusetts providing for the payment of annuities to Civil War soldiers. The court held that the statute was unconstitutional because it authorized the raising of money by taxation for the exclusive benefit of individuals and appropriates for a private purpose money which can only be used for a public purpose.

It is therefore apparent that the decisions of the several states relied on by the appellants do not sustain their claim to contractual vested property rights in the future installments of pensions under the Miller Law as it existed prior to the act of July, 1935. These cases fall into one or more

of the following classes of cases which involved conditions different from those in the case at bar and have no application to pensions such as are provided for under the Miller Law.

1. Where the statute, under which pensioners claim the right, provided for contributions to a regular pension fund. (*Roddy* v. *Valentine,* 268 N. Y. 228, 197 N. E. 260; *Dismuke* v. *U. S.,* 297 U. S. 167; *Trotzier* v. *McElroy,* 182 Ga. 719, 186 S. E. 817; *Retirement Board* v. *McGovern,* 316 Pa. 161, 174 Atl. 400; *Renz* v. *Hibbing Firemen's Relief Association,* 186 Minn. 370, 243 N. W. 713; *Casserly* v. *City of Oakland,* 6 Cal. (2d) 64; *Fellows, Atty. Gen.* v. *Connelly,* 193 Mich. 499.)
2. Where the court merely decided that the legislature by statute had the power to provide for a pension scheme for persons in service and no question of any subsequent act of the legislature was involved. (*Bowler* v. *Nagel,* 228 Mich. 434, 200 N. W. 258; *Matter of Mahon* v. *Board of Education,* 68 N. Y. App. Div. 154; *Fellows, Attorney General* v. *Connolly,* 193 Mich. 499, 160 N. W. 581; *Mead* v. *Acton,* 139 Mass. 341; *State* v. *City of Minneapolis,* 174 Minn. 594; *State* v. *State Annuity Board,* 219 Wis. 31; *State* v. *Love,* 89 Neb. 149; *Cobbs* v. *Home Ins. Co.,* 18 Ala. App. 206.)
3. Where the particular lump sum payment accrued and was past due. (*Kavanagh* v. *Police Commissioners,* 134 Cal. 50; 66 Pac. 36.)
4. Where the act, under which the pensioner claimed a right to his pension, was still in force and had not been changed by subsequent act of the legislature. (*Lage* v. *City of Marshalltown,* 212 Ia. 53, 235 N. W. 761; *Renz* v. *Hibbing Firemen's Relief Association,* 186 Minn. 370, 243 N. W. 713.)

From a review of the decisions cited by both sides to this controversy, we find that in some cases in some states, courts have held that pensioners have vested rights in a

pension fund because they have contributed by salary deductions or by actual voluntary payments into the fund. In some of those jurisdictions, the courts have held that even though there were contributions to a pension fund, the legislature could reduce pensions, because the pensioners had no vested right in the amount of future pension installments. Here there was no fund and no contribution. Under such state of facts, we submit that the overwhelming weight of authority is in accord with the decisions of the Supreme Court of Illinois to the effect that pensions payable solely out of public moneys are not based on contracts but are mere expectancies based on anticipated continuance of existing laws and that future installments of pensions are not vested property rights. It follows that the State may reduce future installments of pensions such as are provided by the Miller Law without violating any provision of the Federal Constitution.

II.

The Miller Law amounts to no more than a declaration of legislative policy on pensions and the acceptance of its benefits does not create a contract.

Before proceeding with the discussion under this heading, we desire to point out that the specifications of error relied on by appellants, appearing on pages 13 and 14 of their brief, disclose that their sole objection to the Miller Law of 1935 is that it violates Section 10 of Article I of the Federal Constitution and the 14th amendment thereto. Their brief, however, intimates that if their contract theory is not accepted, then the pension provisions of the Miller Law violate Section 19 of Article IV of the Illinois Constitution which prohibits the granting of extra compensa-

tion, fee or allowance to any public officer, agent or servant after service has been rendered. We submit that such intimation should be disregarded, as that question is not involved in this appeal.

Appellants assert that they were assured by the 1917 amendments to the General School Law and by the decision in the case of *Armstrong* v. *City of Chicago,* 247 Ill. App. 584, of permanency of position or tenure in office. They therefore conclude that the Miller Law purported to be an offer to waive what the appellants considered to be permanent tenure of office. In other words, they base their contract theory on the assumption that having once granted tenure in office the legislature was powerless to change that status and passed the Miller Law to get the teachers to waive that right.

We respectfully submit that the right of the legislature to provide for compulsory retirement of teachers at the age of 70 under the Miller Law of 1926 or at age 65 under the 1935 Act, has never been contested by any of the appellants, nor is that question involved here. In appellants' brief filed in the Supreme Court of the State of Illinois, the appellants stated on page 62: "These appellants do not question the right of the legislature to lower the compulsory retirement age." Nor is it contended in their brief filed in this court that Section 1 of the Miller Law providing for compulsory retirement is invalid.

By Section 1 of Article 8 of the Illinois Constitution, The General Assembly is charged with the duty of establishing and maintaining a system of free schools whereby all children of this State may receive a good common school education. The method of conducting the schools, the employment of teachers, principals, attorneys and other em-

ployes and the determination of which of them and under what conditions they shall be employed or have tenure, the making of provisions for funds for establishing and maintaining the schools are thus committed to the legislature. The power to make such changes as the legislature deems advisable is necessarily a continuing one.

The courts have repeatedly held that the public schools were not created nor are they supported for the benefit of the teachers therein, as implied by the contention of the appellants. Such schools are maintained for the benefit of the pupils and the resulting benefit to their parents and to the community at large (*Bates* v. *Board of Education,* 139 Cal. 145). Even the taxpayers' interests must receive consideration.

In the past the legislature has many times changed the method of operating the public school system. It has created boards of trustees, changed their terms of office and prior to the Otis Law, provided that teachers should be employed for a period of one year only and then by contract. In 1917 the legislature passed the Otis Law reducing the number of members of the Board and changing many other provisions of the statute relative to the maintenance of the schools in Chicago including the provision for the contract method of hiring. It also provided for the so called "tenure of office."

The broad powers and discretion of the legislature in the matter of school affairs have frequently been recognized by the Illinois courts as well as by this court.

In *Keime* v. *Community High School District,* 348 Ill. 228, the court in defining the powers of the General Assembly relative to schools said on page 234:

> "School districts are quasi-municipal corporations, are subject to the plenary control of the legislature,

> and the latter body may from time to time, in its discretion, abolish school districts, or enlarge or diminish their boundaries *or increase, modify or abrogate their powers.* (24 R. C. L. Par. 6, p. 563.) (Italics supplied.)

Appellants assert that the case of *Armstrong* v. *City of Chicago,* 247 Ill. App. 584, supports their claim of permanency in office. We submit that on the contrary, it sustains the validity of the retirement provisions of the Miller Law.

In that case, certain teachers and principals, some of whom are appellants here, filed suit to declare invalid a resolution of the Board of December 9, 1925, which caused their retirement at 70 years on the ground that the Board had no legislative authority so to do.

The court reinstated the complainants because there was no legislative authority granting such power to the Board. It further held that inasmuch as the Miller Act had become a law in the interim the restoration of the teachers was subject to its provisions.

In so holding the court said on page 599:

> "Accordingly, such decree is reversed and the cause is remanded to the Circuit Court with directions that it enter a decree directing the Board of Education to restore complainants to their respective positions as principals and teachers in the Chicago Public Schools, as of the date of their retirement or removal therefrom by said Board about January 30, 1926, *but that their tenure in said positions be subject to the provisions of said 'Miller Act' as originally in force on May 19, 1926, and as amended on June 24, 1927.*" (Italics ours.)

We believe that the law is too well settled to require an extended citation of authorities on the proposition that offices or employments created by statute are wholly within the control of the legislature which may at pleasure create

or abolish them, modify their duties, shorten or lengthen their terms, increase or diminish their salary or change the mode of compensation. (*U. S.* v. *Hartwell,* 6 Wall. 385; *Hughes* v. *Traeger,* 264 Ill. 612.)

This principle of law was adhered to by this court in the recently decided case of *Phelps* v. *Board of Education of the Town of West New York, et al., supra,* when it stated that:

> "The position of the appellants is that by virtue of the Act of 1909 three years of service under contract confer upon an employe of a school district a contractual status indefinite in duration which the legislature is powerless to alter or to authorize the board of education to alter. The Supreme Court holds that the Act of 1909 'established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify * * * The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change.'"

and proceeded to affirm the decision of the Supreme Court of the State of New Jersey.

It is apparent therefore that the legislature has the power not only to create an office or employment but it likewise has the power to change or modify the tenure of that office. Since the legislature of Illinois had the power to provide for compulsory retirement of teachers, the retiring teachers had no absolute or vested right to continue to teach and therefore none to waive. The legislature derived its power to control teachers' tenure from the Constitution of Illinois (Sec. 1, Art. VIII) and not from any contract with individuals (teachers).

We therefore respectfully submit that the provision made by the legislature for the additional or Miller Law pension was not an offer to enter into a contract but a declaration of policy.

Notwithstanding this settled rule that the legislature at all times is in control of such matters as tenure and pensions, appellants urge that they are entitled to consideration because they say that they gave up permanent teaching positions with salaries largely in excess of the pensions received by them on retirement. This is not substantiated by the record.

The salaries received by public school teachers in Chicago prior to the acts of the legislature in 1935 are set forth in the answer filed by appellees (R. 115). These figures were not denied in the replication (R. 150). The maximum salary of an elementary teacher, teaching full time in the public schools, was $1912.50. The same teachers upon retiring prior to the 1935 Miller Act received annually two pensions—one for from $800 to $1,000 per annum from the Public School Teachers' Pension and Retirement Fund and another pension of an additional $1,000 to $1500 under the Miller Law. Those compulsorily retired received an aggregate of $2,500. This total of $2,500 was $587.50 more per year than was received by the active teacher who was in the highest elementary salary group. The salary of a teacher in the lower group, that is in the first year of service was $1127.50. The retired teachers performing no service whatever therefore received a pension aggregating $1372.50 more per year than the salary of a teacher in the lower group (R. 115).

Of the 945 appellants in the case an overwhelming majority were retired elementary school teachers. None of the

retired elementary teachers testified. However two high school principals named Armstrong and Dodge and one high school teacher named Keehn and one elementary school principal named Reynolds testified. Only one of them retired voluntarily (R. 184-186).

Of course, these were among the highest paid members of the teaching force.

We respectfully submit that these four instances do not disprove the statement of appellees, that the great majority of retired teachers received from $587.50 to $1372.50 per annum in excess of the annual salaries of the active elementary teachers as a result of adding the Miller Act pension to the pension received on retirement from the Teachers' Pension and Retirement Fund prior to 1935; that with the Miller Act pension reduced to $500 the retired teachers are now receiving, together with the $800 to $1,200 from the regular Teachers' Pension and Retirement Fund, an aggregate of from $1,300 to $1,700 per annum which compares very favorably with the amount received by the average active elementary teacher.

But these considerations of comparative payment to active and to retired teachers it would seem only add another element to a case which is based on theories that are difficult to reconcile. On the one hand, appellants claim that notwithstanding the Miller Law pensions were costing the Board of Education of the City of Chicago over $1,000,000 per year, it procured the removal from service of teachers whose salaries were in the higher brackets and who were induced to retire because of its provisions. (Appellants' brief, 53.) On the other hand, they contend that it operated as an inducement to remain in the service (Appellants' brief, 33) and in support of that theory point out that the

figures made in 1927 by an actuary disclosed that prior to the passage of the Miller Law the average retirement age of teachers was 57, whereas after its passage it was 60. (Appellants' brief, 7.)

While we are unable to determine whether or not appellants based their claims for consideration on the theory that the Miller Law induced continuance in or retirement from service, we point out at this time that the same inducements were operating continuously throughout the same period to the same people because of the provision for pensions under the regular Teacher's Retirement and Pension Fund, viz. relief from further service and receipt of a pension.

In support of their theory that appellants were parties to contracts with the State, they cite *New Jersey* v. *Yard,* 95 U. S. 104. That case involved the determination of the right to change by subsequent legislation, terms of a railroad charter.

The court held that it would look into the intention of the legislature in order to determine whether or not it intended to make a contract or make a law that was subject to repeal.

The facts disclose that the railroad company in 1865 sought an agreement with the legislature to build a branch road or roads and power to acquire right of way and the State wished the question of the right to tax the corporation to be settled; that the company denied the right of the State to tax them under their charter until the road paid a net income of 7% per annum on its costs; that by the terms of the agreement this subject of disagreement was adjusted, additional rights granted and the tax fixed; that the legislature was not willing to rest this contract in

the usual statutory form but required the execution of a complete, formally written instrument evidencing the contract, signed by the Governor and the presiding officers of both houses of the New Jersey legislature for one party, and the president, secretary of the railroad company for the other party.

The court at page 115 said:

> "It does seem as if the legislative intention was to make a contract in the same manner and on the same terms of equal obligation, as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties."

In this case the intention of the legislature to contract with a specific company for a specific purpose can be seen from an examination of the act itself and the principle involved was entirely different from that involved in the consideration of an act where the legislature announces a general course of conduct respecting a subject matter to be pursued until subsequently altered by it because of circumstances or its changed views of policy.

The question of whether or not acts of various State legislatures offering inducements which caused individuals or corporations to expend large sums of money in consequence thereof, constituted contracts has often been before this court for its determination. A much cited case on this subject is *Salt Mfg. Co.* v. *East Saginaw,* 80 U. S. 373, 20 L. ed. 611, which involved an amendment to an act of the General Assembly of the State of Michigan providing that all companies or corporations formed or which might be formed for the purpose of boring for and manufacturing salt in the state, and any and all individuals engaged or to be engaged in such manufacturing should be entitled to

the benefits of the act, providing that all property real and personal used for such purposes should be exempt from taxation and there should be paid from the treasury of the state to any individual company or corporation, the sum of 10 cents for each and every bushel of salt manufactured by such individual company or corporation from water obtained from boring in the state, provided that at least 5,000 bushels of salt were manufactured. The bill filed in the case alleged that the East Saginaw Salt Manufacturing Company was induced because of the encouragement held out by the act, to form a corporation, for the purpose of making experiments to determine whether or not salt could not profitably be made in Michigan and erected the necessary buildings and procured the requisite machinery, drilled and found brine of sufficient strength and purity to warrant the company in proceeding to manufacture salt. The salt was actually manufactured from the salt water obtained and 6,358 barrels of salt, each containing 5,000 thousand bushels was manufactured. Later the act was amended so as to limit the tax exemption to five years from the date of the organization of the company and limited the amount of bounties to be paid to any one individual or corporation to the sum of $5,000.

The court on page 376 said:

> "The question in this case is; Whether any contract was made at all, and, if there was, whether it was a contract determinable at will or of perpetual obligation?"

The court in determining this issue said at page 376:

> "Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the con-

tinuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that all corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that State, shall be exempt from taxation as to all property used for that purpose and, after they shall have manufactured 5,000 bushels of salt, they shall receive a bounty of ten cents per bushel. That is the whole of it. As the Supreme Court of Michigan says, it is a bounty law and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remain unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law every inhabitant of the State, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms and doing the things which it promises to reward, but is also at liberty at any time to abandon such a course."

Again the court said at page 379:

"In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time."

In the case of *Wisconsin & Michigan Railway Company*, v. *Powers*, 191 U. S. 378, 48 L. ed. 229, the act which it

was contended was the basis of the contract, is stated in the opinion, p. 384:

> "The alleged contract is contained in a law of May 27, 1893, Section 3, which after levying a specific tax on railroads, provided 'that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile, except,' etc."

The railroad company was incorporated and constructed the railroad north of parallel 44 and its gross earnings never equalled $4,000 per mile. On June 4, 1897, the state passed a law amending the act of 1893 and levying a special tax upon the property and business of every railroad corporation within the state. The court held that the act of 1893 followed by the building and operating of the railroad did not constitute a contract and in so holding on page 387 said:

> "The broad ground in a case like this is that, in view of the subject-matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, * * *."

Another case in which it was contended that the statute constituted an offer, which when acted upon ripened into a contract, is the case of *Stanislaus County* v. *San Joaquin & K.'s R. C. & I. Co.*, 192 U. S. 201, 48 L. ed. 406. The act of 1862 which it was contended constituted the offer provided that every company organized as provided therein should have the power granted therein to establish, collect and receive rents, water rents, or tolls, which should be subject to regulation by the board of supervisors of the county or counties in which the works were situated, but which should not be reduced by the supervisor so low as to yield to the stockholders less than 1½% per month upon the capital actually invested.

In 1885, the legislature passed an act providing for the fixing by the board of supervisors of the county of the rates to be collected by water companies. Section 5 of the act authorized the various boards of supervisors to regulate and control water rates that might be charged in their respective counties. The act provided that said boards in fixing such rates should as soon as possible adjust them so that the net annual receipts and profits of said companies so furnishing such water to individuals should be not less than six nor more than eighteen per cent. upon the value of the canals, ditches, flumes and all other property actually used and useful to the appropriation and furnishing of such water. It appeared that the water company at the time of the passage of the last act, had actually invested under the authority of the act of 1862, a capital amounting to $971,113.13 in money in the purchase and construction of its canals and other property actually used in furnishing the water, and that the property was actually worth that amount.

It is alleged that the amendatory act was in violation and repugnant to the provisions of the constitution of the United States. The court said at page 206,

> "The question then arises whether language such as is contained in the 3d section of that act, and which is set forth in the foregoing statement of facts, amounts to a contract, to be protected by the Constitution of the United States. We think it does not.
>
> It seems to us that language of this nature cannot properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when, in the judgment of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to 1½ per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who used the water, and amount to a very unreasonable compensation to the company for the water it sold."

On page 208, the court said:

> "In our belief, the language of the act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it. The cases heretofore decided in this court are authority for this view."

We have heretofore pointed out that in Illinois up to and since the passage of the original Miller Act, the Supreme court has consistently held that statutes providing for pensions did not bestow contract rights and could be altered or repealed at the will of the legislature. That being the state of the law we respectfully submit that in passing the original Miller Act the legislature used no language in the act which could be construed as an intention to make a contract but it simply made a declaration of policy subject,

as the Illinois courts had always held, to change as circumstances or policy, or its views might dictate.

III.

The Miller Law is a local public law, purely governmental, and has to do with State governmental objects and not with any private enterprise thereof.

Appellees in their statement opposing jurisdiction and motion to dismiss or affirm, made the point that the judicial construction of the Miller Act was purely local and not Federal, and therefore the decision of the Supreme Court of Illinois thereon is final and not subject to review, citing in support thereof *Atkin* v. *Kansas,* 191 U. S. 207 (48 L. ed. 148) and *Hein* v. *McCall,* 239 U. S. 175 (60 L. ed. 206) and giving supporting quotations from the opinions of this court in both cases.

Appellants in their brief made no reply to this point, and appellees again urge the effectiveness of this point and its decisiveness. The views expressed in the case of *Adkins* v. *Children's Hospital,* 261 U. S. 547, approve this rule. It is there said that while freedom of contract is the general rule and restraint the exception, there are numerous decisions where interference with such freedom has been upheld on various grounds, among which are statutes relating to contracts for the performance of public work. While this case has been overruled, it was overruled on points other than this, and the above principle was not overruled or questioned and is still the law.

Not only will this court follow the opinion of a State court in its construction of a State statute, but should the views of the State court be modified or changed, the new holdings will be followed by this court.

Quoting from *Greene* v. *Lessee of Neal,* 6 Pet. 291, 295-298, 8 L. ed. 402, 404, 405:

> "* * * But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a State, should be considered as final by this court; not because the State tribunal, in such a case, has any power to bind this court; but because, in the language of the court in the case of *Shelby et al.* v. *Guy* (11 Wheat., 361), 'a fixed and received construction by a State in its own courts, makes a part of the Statute law.'
>
> "The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction. A reference is here made not to a single adjudication, but to a series of decisions which shall settle the rule. * * *"

This court is without power to put a different construction upon a State statute from that adopted by the highest court of the State.

In *Morehead* v. *New York ex rel. Tipaldo,* 80 L. ed. 921, the court in its opinion said:

> "* * * This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Supreme Lodge, K. P.* v. *Meyer,* 265 U. S. 30, 32, 68 L. ed. 885, 887, 44 S. Ct. 432.
>
> "Exclusive authority to enact carries with it final authority to say what the measure means. *Jones* v. *Prairie Oil & Gas Co.,* 273 U. S. 195, 200, 71 L. ed. 602, 608, 47 S. Ct. 338.

"The standard of 'minimum fair wage rates' for women workers to be prescribed must be considered as if both elements—value of service and living wage—were embodied in the statutory definition itself. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 220, 58 L. ed. 1284, 1286, 34 S. Ct. 853.

"As our construction of an Act of Congress must be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. *Green* v. *Neal,* 6 Pet. 291, 295-298, 8 L. ed. 402, 404, 405."

Quoting from the opinion in the *Meyer* case, *supra*:

"Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the State legislation as though such meaning had been specifically expressed therein. See, for example *Leffingwell* v. *Warren,* 2 Black 599, 603; *Green* v. *Lessee of Neal,* 6 Pet. 291, 297-300. And we follow the state construction even though it may not agree with our own opinion. *Supervisors* v. *U. S.,* 18 Wall. 71, 82; *Shelby* v. *Guy,* 11 Wheat, 361, 367; *Tioga R. R.* v. *Blossburg & Coming R. R.,* 20 Wall 137, 143."

Quoting from the opinion in *Jones, et al., Trustees* v. *Prairie Oil & Gas Co., supra*:

"• • • But apart from that consideration no case yet has gone to the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the legislature. If we thought the decisions cited far more questionable than we do, we nevertheless should bow to them as binding upon a matter of local administration and of only *local concern.*"

We believe that it is well settled by decisions of this court that it is within the province and privilege of the State courts to construe their own statutes and it is no function of the United States Supreme Court to review such decisions, as the Supreme Court is bound by the decision of the State court in regard to the meaning of the constitution and laws of its own state. (*Turner* v. *Board of Commissioners,* 173 U. S. 461, 43 L. ed. 768; *Jackson ex dem. Hart* v. *Lamphire,* 3 Peters 280, 7 L. ed. 679; *Commercial Bank of Cincinnati* v. *Buckingham, Executor,* 5 How. 317, 12 L. ed. 169.)

IV.

Where a statute is claimed to create a contractual right, this court will give weight to the construction of the statute by the courts of the state. Unless such construction is palpably erroneous, this court will accept the construction placed upon such statutes by the state courts.

The court below in unequivocal terms held that the pensions paid under the Miller Law were not based upon contract. On page 550 of its opinion found in 364 Ill. 547, it says:

> "As stated by counsel for appellants in their reply brief, 'Appellants' case rests upon the proposition that they have vested property rights to the payment of future installments of the annuities on the basis fixed by the law in force at the time they retired, or being entitled to retire, or made application for retirement.'"

In deciding adversely to this contention, the court on page 552 said:

> "A right, to be within the protection of the constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated

> continuance of an existing law. If before rights become vested in particular individuals, the convenience of the state induces amendments or repeal, such individuals have no cause to complain. * * * The decisions of this court have uniformly been that pensions are not based upon contract but are mere expectancies based upon anticipated continuance of existing law, and that future installments of pensions are not vested property rights. It follows that the state may reduce future installments of pensions without violating the provisions of the state or federal constitution."

This decision is sustained not only by the cases cited in that opinion but the principles announced have been adhered to in all Illinois cases without exception.

In the recent case of *Phelps* v. *Board of Education, supra,* it was contended that under the statute in question there was granted to teachers, permanency in position at fixed salaries which could not be impaired by a subsequent act of the legislature. This contention is identical in principle with that of appellants, who contend that the Illinois statute granted to them permanency of pension at fixed pension rates, which could not be changed by subsequent acts of the legislature.

In order to point out to the court the similarity of the *Phelps* case to the one at bar, we set up in parallel columns the contentions and the State Court decisions in the respective cases:

PHELPS CASE.

1. Appellants contended that the decision of the State Court violated Art. 1, Sec. 10 and Sec. 1 of the 14th Amendment of the Federal Constitution.

2. Appellants contended that the statute pertaining to tenure of teachers prior to its amendment conferred upon teachers a contractual status which the legislature was powerless to alter.

3. Appellants contended that the legislature having provided that the compensation should not be reduced, violated the Constitution when it subsequently reduced or authorized a reduction in compensation.

4. The Supreme Court of New Jersey held that the tenure act of 1909 "established a status for teachers but * * * failed to see that it established a contractual one that the legislature may not modify" and the court further held that "the status of tenure teachers, * * * is in essence dependent on a statute, like that of the incumbent of a statutory office, which the legislature at will may abolish or whose emolument it may change."

DODGE CASE.

1. Appellants contend that the decision of the State Court violated Art. 1, Sec. 10 and Sec. 1 of the 14th Amendment of the Federal Constitution.

2. Appellants contend that the Miller Law prior to its amendment conferred on retired teachers or those who made application for retirement a contractual status which the legislature is powerless to alter.

3. Appellants contend that the legislature having fixed the amount of pension at $1500, violated the Constitution when it reduced it to $500.

4. In the case at bar, the Supreme Court of Illinois held "The decisions of this court have uniformly been that pensions are not based on contract but are mere expectancies based upon anticipated continuance of existing laws, and that future installments of pensions are not vested property rights. It follows that the State may reduce future installments of pensions without violating the provisions of the State or Federal Constitution."

This Court in the *Phelps* case, *supra,* in passing upon the weight that should be given to the decision of the Supreme Court of New Jersey and in affirming it, said:

> "This court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state. Here those courts have concurred in holding that the act of 1909 did not amount to a legislative contract with the teachers of the state and did not became a term of the contracts entered into with employes by boards of education. Unless these views are palpably erroneous we should accept them."

In support of this holding this Court cited the cases of *Freeport Water Co.* v. *Freeport,* 180 U. S. 587, 595; *Tampa Water Works* v. *Tampa,* 199 U. S. 241, 243; *Milwaukee Elec. Ry. Co.* v. *Railroad Comm.,* 238 U. S. 174, 184; *Seton Hall College* v. *South Orange,* 242 U. S. 100, 103, *Coombes* v. *Getz,* 285 U. S. 434, 441.

Conclusion.

Since Miller Law pensions are payable solely out of taxes levied annually for educational purposes and the teachers make no contributions whatsoever for such pensions either by deductions from salaries or by voluntary payments for that purpose, we submit that the Illinois Supreme Court properly held that such pensions are not based on contract, but are mere expectancies based on anticipated continuance of existing laws and future installments thereof are not vested property rights. A reduction or change in the pensions, therefore, does not affect any vested right. The holding of the Illinois court is in conformity with all previous decisions of the Illinois Supreme

Court and is in line with the overwhelming weight of authority in other States and the decisions of this court.

We therefore respectfully submit that the motion of the appellees to dismiss the appeal should be allowed, or, in the alternative, that the decree of the court below should be affirmed.

Respectfully submitted,

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APPENDIX.

Miller Law as in Force Prior to 1935 Amendments.

"An Act to Provide for the Compulsory and Voluntary Retirement of Teachers, Principals, District Superintendents, and Assistant Superintendents, and for the Voluntary Retirement of Superintendents of Schools and Members of the Board of Examiners, and for the Payment of Retirement Annuities. (Approved May 19, 1926; title as amended by act approved June 17, 1929, L. 1929, p. 732.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

614a. Retirement of Teachers, Etc.) Sec. 1. In every city in this State having a population exceeding 250,000 inhabitants, the board of education of such city shall retire from active service on February 1 and August 1 of each year, all teachers, principals, district superintendents, and assistant superintendents in the public schools of such city in accordance with the following schedule:

(a) In the year 1926 all teachers, principals, district superintendents, and assistant superintendents, seventy-five or more years of age, shall be retired from active service.

(b) In the year 1927 all teachers, principals, district superintendents, and assistant superintendents seventy-four or more years of age shall be retired from active service.

(c) In the year 1928 all teachers, principals, district superintendents, and assistant superintendents seventy-three or more years of age, shall be retired from active service.

(d) In the year 1929 all teachers, principals, district superintendents, and assistant superintendents seventy-two or more years of age, shall be retired from active service.

(e) In the year 1930 and in each and every year thereafter, all teachers, principals, district superintendents, and assistant superintendents seventy or more years of age, shall be retired from active service.

614b. Annual Pension.) Sec. 2. Each person so retired from active service who served in the public schools of such city for twenty or more years prior to such retirement, shall be paid the sum of fifteen hundred dollars ($1,500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes: Provided, that any teacher, principal, district superintendent, or assistant superintendent so retired and receiving such annuity shall be subject to the call of the superintendent of schools in such city for consultation and advisory service. And, provided further, that nothing in this Act contained shall in any way impair or prejudice any rights of a teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers' pension fund, or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State; and shall not repeal or modify any other such statutory provisions.

614c. Voluntary Retirement—Annuity.) Sec. 3. Any superintendent of schools or member of the board of examiners and all teachers, principals, district superintendents, and assistant superintendents, now or hereafter serving in any of the aforesaid capacities in the public schools of

such city, and whose services in any one or more of any educational positions in the public schools of such city within the last twenty (20) years prior to retirement under this Act, shall aggregate, when taken together, fifteen (15) years or more, and who have served in the public schools of the United States for twenty-five years or more, and who are sixty-five (65) or more years of age, and who have not reached the age of compulsory retirement, as provided in sections one and two of this Act, shall upon their own request, be retired from active service and thereafter be paid annuities for life from the moneys derived from the general tax levy for educational purposes; provided that no superintendent of schools or member of said board of examiners shall be subject to compulsory retirement under the provisions of this Act, during his or her term of office.

Such annuities shall be paid respectively according to the following table of ages and annuities annually:

Age 65.....Ten hundred dollars.....($1,000)
Age 66.....Eleven hundred dollars.....($1,100)
Age 67.....Twelve hundred dollars.....($1,200)
Age 68.....Thirteen hundred dollars .....($1,300)
Age 69.....Fourteen hundred dollars.....($1,400)

And provided that the age of sixty-five (65) and at any year of age thereafter, the board of education of such city may require a physical or a mental examination of any such teacher, principal, district superintendent, or assistant superintendent upon the request of the superintendent of schools of such city and if any such teacher, principal, district superintendent, or assistant superintendent be found incapacitated for service after trial as already or hereafter provided by law he shall be retired at the annuity above provided for that age of voluntary retirement.

And provided further, that all such superintendents of schools, members of the board of examiners, teachers, principals, district superintendents, and assistant superintendents shall be subject to the same conditions as to advisory service as provided for in Section 2 of this Act. Nothing contained in this Act shall in any way impair or prejudice the right of any superintendent of schools, member of the board of examiners, teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers pension fund or teachers' pension and retirement fund established in accordance with the provisions of any statute of this State, and the payment to be made under this section, or the Act which it amends, shall be in addition to any such annuity.

(As amended by Act approved June 17, 1929. L. 1929, p. 732.)

Section added: L. 1927, p. 792.

(Smith-Hurd Ill. R. S. 1933, Ch. 122, Par. 614a (Sec. 1), 614b (Sec. 2) and 614c (Sec. 3).)

Miller Act of 1935.

(Act Complained of.)

"An Act to Provide for the Compulsory Retirement of Teachers, Principals, District Superintendents, and Assistant Superintendents, and for the Payment of Retirement Annuities.

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

"614a. Retirement of Teachers, etc.) Sec. 1. In every city in this State having a population exceeding 250,000

inhabitants, the board of education of such city, as soon as practical after this law becomes effective, shall retire all teachers, principals, district superintendents and assistant superintendents in the public schools in such city, who are sixty-five or more years of age, and thereafter shall retire all teachers, principals, district superintendents and assistant superintendents in the public schools of such city, on attaining the age of sixty-five years.

"614b. Annual Pension.) Sec. 2. Each person so retired from service shall be paid the sum of Five Hundred Dollars ($500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes: Provided, that any teacher, principal, district superintendent, or assistant superintendent so retired and receiving such annuity shall be subject to the call of the superintendent of schools in such city for consultation and advisory service: And, provided further, that nothing in this Act contained shall in any way impair or prejudice any rights of a teacher, principal, district superintendent, or assistant superintendent so retired to annuity under other statutory provisions concerning any teachers' pension fund, or teachers' pension and retirement fund, established in accordance with the provisions of any statute of this State.

"614c. Sec. 3. Repealed."

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